MITCHELL COTTS & CO. LTD. v. BRYANNE

[O. C. J. (Willan C.J.) February 22, 1949]

[K.L. — Civil Suit No. 7 of 1949]

Civil Procedure Code (Cap. 7), ss. 127, 459 and 597 — Summary Procedure — Whether claim comes within the provisions of s. 459(i) — Power of Court to set aside ex parte decree in Summary Procedure suits.

In this case the plaintiff firm and the defendant had agreed that in consideration of the defendant resigning from the plaintiff firm and leaving the Federation of Malaya the plaintiff firm would pay the debts amounting to $11,332.51 incurred by the defendant. The defendant did resign from the defendant's firm but did not leave the Federation of Malaya. The plaintiff's thereupon sued the defendant by way of summary procedure claiming the sum of $11,332.51 and obtained judgment. The defendant applied to have the decree set aside.

Held: (1) the claim in this case is in fact for damages for alleged breach of agreement and the suit was not properly admitted as a Summary Procedure Suit; (2) the Court has power under s. 597 of the Civil Procedure Code to set aside the decree in this case; (3) it was necessary for the ends of justice that the decree should be set aside.

Cases referred to :—

(1) *Mohamed Manjural Haque v. Bissesswar Banerjee* A.I.R. 1943 Cal. 361 at p. 367.

(2) *Bhagat Singh v. Jugbir Sawgney* A.I.R. 1941 Cal. 670 at p. 672.

SUMMARY PROCEDURE SUIT. Motion to set aside decree *ex parte*.

J. Hall for the plaintiff.

F. G. Charlesworth for the defendant.

Willan C.J. : — In this case the plaintiff firm filed a plaint on the 25th of January, 1949, claiming against the defendant the sum of $11,332.51, interest on the said sum from the date of judgment until realization thereof, and costs.

This plaint was headed with the words "Summary Procedure" under section 459 of the Federated Malay States Civil Procedure Code, and the suit was instituted under Chapter XXXIX of that Code, which provides a summary procedure or claims for debt or liquidated demands.

A summons in the Form No. 161 of the Second Schedule in the Code was issued, and the summons, together with a copy of the plaint, was served on the defendant on the 28th January 1949. The summons provided that the defendant, if he wished to defend the suit, should apply to do so within ten days, inclusive of the day of service, from the date on which the summons was served on him — i.e. ten days from the 28th January, 1949. The defendant failed to make such an application within that time.

On the 8th February, 1949, the solicitors of the plaintiff firm appeared before the Assistant Registrar, Supreme Court, and obtained judgment for the amount claimed under section 459(iii) of the Code. The defendant presented an application for leave to defend on the same day, the 8th February, 1939, just after judgment had been entered against him.

The defendant has now applied by Motion for an order :—

(1) That the Decree entered in the suit against the defendant on the 8th February, 1949, be set aside.

(2) That the suit be treated as a suit not by way of Summary Procedure and that directions be given as to the further conduct thereof.

In the alternative to paragraph (2).

(3) That the defendant be granted liberty to apply out of time for leave to defend the suit.

The affidavit of the defendant supporting the Motion sets out two grounds why one or other of the orders prayed for in this Motion should be made :—

First. — That the claim of the plaintiff firm against the defendant is not a claim which comes within the provisions of s. 459(i) of the Civil Procedure Code.

Secondly. — That the presentation by the defendant of an application for leave to defend was not made within the prescribed time because of a mistake on the part of the defendant and his solicitors, who thought that the time in which such an application could be presented did not expire until the 8th February, 1949.

With regard to the first ground it is necessary to examine the plaint. It discloses that the defendant was employed by the plaintiff firm as a Joint Manager of the office of the plaintiff firm in Kuala Lumpur. At the end of December, 1948, the defendant was indebted to eighteen individuals, firms and clubs to the extent of $8,071.39, and to the plaintiff firm on account of advances made to him amounting to $3,261.12, making $11,332.51 in all. According to the plaint it was agreed between the plaintiff firm and the defendant on or about the 28th December, 1948, that in consideration of the defendant resigning from the plaintiff firm and leaving the Federation of Malaya the plaintiff firm would pay the above mentioned debts incurred by the defendant. (Hereinafter in this judgment I refer to this as "the resignation agreement" in order not to confuse it with the contract of employment which the defendant had with the plaintiff firm, which is also referred to later in this judgment). The plaintiff firm paid the debts of the defendant to the eighteen individuals, firms and clubs — i.e. $8,071.39, but the defendant failed to leave the Federation of Malaya. In consequence of that failure by the defendant, the plaintiff firm brought this suit by way of Summary Procedure claiming against the defendant the sum of $8,071.39 paid by them, and also the sum of $3,261.12 advances made by them to the defendant — total $11,332.51.

Section 459(i) of the Civil Procedure Code reads :—

> In all suits in the Supreme Court, or in any other Court to which this Chapter applies, where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (a) upon a bill of exchange, promissory note, cheque, or bond, or upon a lease or upon any other contract, express or implied, for payment of a liquidated amount of money; or (b) upon a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only; or (c) upon a trust; the plaint may, if the plaintiff desires to proceed summarily, be headed with the words "Summary Procedure", which heading shall be signed in the manner prescribed for the signature of plaints. In every such case the summons shall be in the Form contained in the Second Schedule, No. 161, or in such other Form as the Judges of the Supreme Court, by notification in the Gazette, may from time to time prescribe.

The part of that sub-section relevant to this case is paragraph (a). It is common ground that if the claim does not come within the meaning of the words "payable by the defendant .... arising .... upon any other contract, express or implied, for payment of a liquidated sum of money" the suit was not properly brought under Chapter XXXIX of the Civil Procedure Code.

Mr. Charlesworth, for the defendant, submitted that the claim against the defendant was not a liquidated demand due upon a contract but a claim for damages because the defendant, having kept his promise to resign from the plaintiff firm had not fulfilled that part of the resignation agreement which related to his leaving the Federation of Malaya.

Mr. Hall, for the plaintiff firm, argued that the claim arose out of a breach of the resignation agreement by the defendant, and that the amount due by the defendant was a liquidated demand of a sum certain i.e. $11,332.51. He further argued that the suit should remain as a Summary Procedure suit because it had been admitted as such by the Senior Assistant Registrar in the Registry.

Questioned by me, Mr. Hall admitted that if the defendant had left the Federation of Malaya the suit would never have been brought.

In my opinion the view put forward by Mr. Charlesworth is correct. The claim by the plaintiff against the defendant is for damages because of the alleged breach of the resignation agreement by the defendant in that he failed to leave the Federation of Malaya. The resignation agreement, so far as the defendant is concerned, can be dividend into two parts —one relating to his resignation and the other to his leaving Malaya. With regard to the first part, the plaintiff firm has secured his resignation; this is important because under his contract of employment the plaintiff firm could not have terminated his services without liability. If therefore the judgment in this case is to stand, it would mean that the plaintiff firm has secured for nothing the resignation of the defendant.

I find that this suit was not properly brought as a Summary Procedure Suit and was wrongly admitted as such by the Senior Assistant Registrar.

Mr. Hall submitted that even if the suit should not have been brought as a Summary Procedure Suit, the defendant's remedy was to apply for leave to defend within ten days allowed him by the summons served on him, and that if he had done so he could have raised the questioned of whether the suit had been properly brought under Chapter XXXIX of the Code. He referred to section 463 of the Code which makes provision for any claim, or any part of any claim, which is not a debt or liquidated demand within the meaning of section 459(i) being struck out. Since the defendant had not taken this course Mr. Hall submitted he could not now come to the Court and ask for judgment to be set aside.

I am unable to agree with that submission because it would be tantamount to holding that if a suit, which should not be brought by way of Summary Procedure, is so brought, and for some reason or other the defendant omits to apply for leave to defend in time, the defendant is left without a remedy.

It must be remembered that such a decree is *ex parte*. By section 127 of the Civil Procedure Code provision is made for setting aside *ex parte* decrees in non-Summary Procedure suits, and I cannot think that a defendant in a Summary Procedure suit, who has had a decree passed against him and can show, as the defendant in this case has shown, that the suit was not properly brought as a Summary Procedure suit should be left without a remedy because, by mistake, he applied to defend less than twenty-four hours out of time, by which time a decree had been entered against him. If it is necessary to have such a safeguard with regard to *ex parte* decrees in non-Summary Procedure suits, it is equally, if not more, necessary, to have a similar safeguard relating to *ex parte* decrees in Summary Procedure suits, bearing in mind the speed at which such suits are dealt with in a busy Supreme Court Registry.

There is no specific provision of the Code, or of the Rules of Court, for setting aside *ex parte* decrees in Summary Procedure suits, but Mr. Charlesworth submitted I have jurisdiction to set aside the decree and make any other necessary orders under section 597 of the Code. That section reads :—

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Mr. Charlesworth submitted there had been an abuse of the process of the Court in that a suit which does not come within 459(i) of the Code, had been brought by way of Summary Procedure.

I must first decide whether section 597 gives me power to set aside the decree in this case. That section is exactly the same as section 151 of the Indian Civil Procedure Code.

There are many decided Indian cases which lay down that section 151 of the Indian Civil Procedure Code cannot be invoked when there is express provision applicable to the particular case — see for instance *Mohamed Manjural Haque v. Bissesswar Banerjee*[1]. It should be noted that in India, by O. 37 R. 4 of the Rules made under the Indian Civil Procedure Code, there is specific power to set aside a decree passed in a Summary Procedure suit. No such specific power exists in our local Civil Procedure Code.

The Indian Civil Procedure Code is not exhaustive, there are cases which are not provided for in it, and therefore the Court, in such cases, can act under section 151 of that Code to do real and substantial justice for the administration of which it alone exists — see *Bhagat Singh v. Jugbir Sawhney*[2].

Following those Indian decisions I decide that I have power under section 597 to set aside the decree passed in this suit, and I also decide that it is necessary for the ends of justice that it should be set aside.

Accordingly I order that the decree passed on the 8th of February, 1949, be set aside, and I make the following necessary and additional orders, also under section 597 :—

(a) That the words "Summary Procedure" at the head of the plaint be deleted, and also the signatures of the attorney of the plaintiff firm and their Solicitors to that heading.

(b) That this suit be treated as a non-Summary Procedure suit, and that the defendant do have 7 days from the date of this judgment i.e. 7 days from the 22nd of February, 1949, in which to enter an appearance. The summons for directions and all other steps necessary for the conduct of the suit to follow in the ordinary course.

As regards costs — since the plaintiff was at fault in bringing this suit as a Summary Procedure suit and the defendant was at fault in not applying for leave to defend in time, I make no order as to costs of this Motion.

Order accordingly.

GAN BOON PUAK & ANOR. v. LIM THYE HIAN

[A. C. J. (Laville J.) February 26, 1949]

[Johore Bahru — Civil Appeal No. 1 of 1949]

Landlord and Tenant — Increase of Rent (Restriction) Enactment, Johore, 1939 — Control of Rent Ordinance, 1948 — Effect of repeal on acquired rights — Effect of notice to quit — Interpretation and General Clauses Ordinance, 1948.

In this case the respondent had given a notice to quit to the appellant expiring on the 30th of September 1947, alleging that the premises were required for his own use. Subsequent to the notice, the Control of Rent Ordinance came into force. It was argued for the appellant that he became a Statutory tenant under s. 15 of the Control of Rent Ordinance, 1948, in that he held over since the date of the expiry of the notice and was still in possession and that in order to terminate his tenancy he must be served with notice to quit again as provided for by s. 16 of the Control of Rent Ordinance in regard to Statutory tenants.

Held: (1) the effect of the notice to quit in this case was that the tenant holding over became a trespasser, with the proviso that except in circumstances falling within s. 8 of the Increase of Rent (Restriction) Enactment, 1939, no action could be taken to eject him without an order of the Rent Board; (2) the repeal of the Increase of Rent (Restriction) Enactment did not affect its previous operation or abrogate anything properly done thereunder, and therefore the notice to quit duly given for the purpose of that Enactment remained a good notice even after that Enactment was repealed; (3) as in this case the landlord had proved that he required the premises for his own use and had determined the tenancy according to law, the provisions of s. 13(f)(i) of the Control of Rent Ordinance were satisfied and this prevented the ex-tenant from becoming a statutory tenant by holding over.

CIVIL APPEAL.

A. J. Braga for the 1st appellant.

A. N. Mitra for the respondent.

Laville J. : — It is agreed that in 1942 1st defendant was a tenant of the Administratrix of the estate of Lim Thye Leong, deceased, on a monthly tenancy at $50 per month.

It is not disputed by 1st defendant that plaintiff succeeded the Administratrix as Administrator in 1947 and that at that date the tenancy of defendant No. 1 was still in existence and continued on the same terms, and that he duly received notice to quit from the plaintiff as successor to the Administratrix on 13th August 1947 determining the tenancy on 30th September 1947; but his claim is that such notice to quit did not determine his tenancy according to law.

At the hearing defendant No. 1 agreed that if the tenancy was determined according to law he had no defence against the plaintiff's claim. He argued that this notice was given before the Control of Rent Ordinance No. 6/48 was in force and is not available